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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**
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14 JAMES GENTRY, and individual; and
15 STACEY GENTRY, an individual,

16 Plaintiffs,

17 vs.

18 PACIFIC RIM REAL ESTATE
19 SERVICES, INC., a California
20 Corporation; TURNEY, MOORE
21 AND HENDERSON, LTD, a
California Limited Partnership; and
DOES 1 through 10, INCLUSIVE,

22 Defendants.
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CASE NO. 3:13-cv-01299-H-
NLS

**ORDER DENYING
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

25 On December 3, 2013, Plaintiffs James Gentry and Stacey Gentry (collectively,
26 "Plaintiffs") filed a motion for partial summary judgment. (Doc. No. 17.) On January
27 7, 2014, Defendant Pacific Rim Real Estate Services, Inc. ("Pacific") filed an
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1 opposition. (Doc. No. 18.) On January 7, 2014, Defendant Turney, Moore &
2 Henderson, Ltd. ("TMH") filed a separate opposition. (Doc. No. 19.) On January 10,
3 2014, Plaintiffs filed a reply in support of their motion. (Doc. No. 20.) On February
4 4, 2014, the Court submitted the motion pursuant to its discretion under Local Rule
5 7.1(d)(1). (Doc. No. 25.) For the following reason, the Court denies Plaintiffs' motion
6 for partial summary judgment.

7 **I. Background**

8 On June 5, 2013, Plaintiffs filed a complaint against Pacific and TMH asserting
9 claims under the Federal Fair Housing Act, the California Fair Employment and
10 Housing Act, the California Unruh Civil Rights Act, common law negligence, and
11 unfair business practices under the California Business and Professions Code. (Doc.
12 No. 1.) Throughout the events at issue in this lawsuit, Plaintiffs lived at Shadow Glen
13 Apartments in Ramona, California. (Id. at 3.) Deena Duran was the resident manager
14 at Shadow Glen Apartments. (Id.; Doc. Nos. 18-2 at 3.) Plaintiffs allege that Ms.
15 Duran implemented and enforced rules that discriminated against them on the basis of
16 familial status. (Doc. No. 1 at 4-7.) TMH owned Shadow Glen Apartments. (Id. at 3;
17 Doc. No. 19-1 at 2.) Pacific managed Shadow Glen Apartments. (Doc. No. 1 at 3;
18 Doc. No. 18-2 at 2.) Plaintiffs argue that because Ms. Duran was an employee of both
19 Pacific and TMH, Pacific and TMH are both vicariously liable for her discriminatory
20 actions. (Doc. No. 1 at 3; Doc. No. 17 at 24-25.)

21 In this motion, Plaintiffs ask for partial summary judgment as to their causes of
22 action under the Federal Fair Housing Act, the California Fair Employment and
23 Housing Act, and the California Unruh Civil Rights Act. (Doc. No. 17 at 2.) Plaintiffs
24 assert that there are no genuine issues of material fact as to these legal claims and that
25 TMH and Pacific are vicariously liable for acts of Deena Duran as a matter of law. (Id.
26 at 15, 24-25.) Defendants TMH and Pacific assert that there are genuine issues of
27 material fact that preclude summary judgment. (See Doc. Nos. 18, 19.)

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II. Legal Standards

A. Summary Judgment Standard

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure if the moving party demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). A dispute is genuine if a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to establish an essential element of the nonmoving party's case on which the nonmoving party bears the burden of proving at trial. Id. at 322-23. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). Once the moving party establishes the absence of genuine issues of material fact, the burden shifts to the nonmoving party to set forth facts showing that a genuine issue of disputed fact remains. Celotex, 477 U.S. at 322. The nonmoving party cannot oppose a properly supported summary judgment motion by "rest[ing] on mere allegations or denials of his pleadings," Anderson, 477 U.S. at 256; but, the nonmoving party need not "produce evidence in a form that would be admissible at trial in order to avoid summary judgment." Celotex, 477 U.S. at 324.

When ruling on a summary judgment motion, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. Matsushita, 475 U.S. at 587. The Court does not make credibility determinations with

1 respect to evidence offered. See T.W. Elec., 809 F.2d at 630-31 (citing Matsushita,
 2 475 U.S. at 587). Summary judgment is therefore not appropriate “where contradictory
 3 inferences may reasonably be drawn from undisputed evidentiary facts.”
 4 Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 (9th Cir. 1980).

5 *B. Vicarious Liability Standards*

6 The Fair Housing Act forbids discriminatory acts in transactions involving rental
 7 housing but is silent as to whether vicarious liability applies. See Meyer v. Holley, 537
 8 U.S. 280, 285 (2003). “Nonetheless, it is well established that the Act provides for
 9 vicarious liability.” Id. District courts are to treat vicarious liability under the Fair
 10 Housing Act in accordance with traditional agency principles. Id.; Curtis v. Loether,
 11 415 U.S. 189, 195-96 (1974). Federal courts generally look to the Second Restatement
 12 of Agency as a reference on traditional principles of agency in tort. See, e.g., Vance
 13 v. Ball State University, 133 S. Ct. 2434, 2441 (2013); Holley v. Crank, 400 F.3d 667,
 14 673 (9th Cir. 2005). Under the Second Restatement, a principal is liable for the
 15 tortious conduct of an agent if the agent committed the act “while acting in the scope
 16 of their employment” or if the principal acted intentionally, recklessly, or negligently
 17 as to the consequences. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).
 18 “Generally, for an agency relationship to exist, a principal must consent to the agent
 19 acting on his behalf and subject to his control, and the agent must consent to act for the
 20 principal.” Holley, 400 F.3d at 673 (citing RESTATEMENT (SECOND) OF AGENCY § 1).

21 In resolving questions of vicarious liability under the California Fair
 22 Employment and Housing Act and the California Unruh Civil Rights Act, courts apply
 23 California principles of vicarious liability. See, e.g., California Fair Emp’t & Hous.
 24 Comm’n v. Gemini Aluminum Corp., 122 Cal. App. 4th 1004, 1015 (2004). Under
 25 California law, the doctrine of *respondeat superior* allows an employer to be “held
 26 vicariously liable for torts committed by an employee within the scope of
 27 employment.” Purton v. Marriott Int’l, Inc., 218 Cal. App. 4th 499, 504 (2013)
 28 (quoting Mary M. v. City of Los Angeles, 54 Cal. 3d 202, 208 (1991)). California

1 courts generally interpret the phrase "scope of employment" broadly. Id. at 505 (citing
 2 Farmers Ins. Group v. County of Santa Clara, 11 Cal. 4th 992, 1004 (1995)).
 3 "Ordinarily, the determination whether an employee has acted within the scope of
 4 employment presents a question of fact; it becomes a question of law, however, when
 5 the facts are undisputed and no conflicting inferences are possible." Id. (quoting Mary
 6 M., 54 Cal. 3d at 213).

7 **III. Discussion**

8 In this motion, Plaintiffs ask for partial summary judgment as to their causes of
 9 action under the Federal Fair Housing Act, the California Fair Employment and
 10 Housing Act, and the California Unruh Civil Rights Act. (Doc. No. 17 at 2.) Plaintiffs
 11 assert that there are no genuine issues of material fact as to these legal claims and that
 12 TMH and Pacific are vicariously liable for acts of Deena Duran as a matter of law. (Id.
 13 at 15, 24-25.) Defendants TMH and Pacific assert that there are genuine issues of
 14 material fact that preclude summary judgment. (See Doc. Nos. 18, 19.)

15 Under federal law, a principal is liable for the tortious conduct of an agent if the
 16 agent committed the act "while acting in the scope of their employment" or if the
 17 principal acted intentionally, recklessly, or negligently as to the consequences.
 18 RESTATEMENT (SECOND) OF AGENCY § 219. Under California law, "[o]rdinarily, the
 19 determination whether an employee has acted within the scope of employment presents
 20 a question of fact" Purton, 218 Cal. App. 4th at 504 (quoting Mary M. v. City of
 21 Los Angeles, 54 Cal. 3d 202, 208 (1991)).

22 The parties dispute a number of issues of fact material to the agency inquiry.
 23 Plaintiffs' Complaint asserts that Deena Duran was an employee of TMH at all times
 24 relevant to the lawsuit. (Doc. No. 1 at ¶ 7.) TMH argues that one of the general
 25 partners of TMH, Margaret Turney Hulter, was unaware of any employment
 26 relationship between TMH and Ms. Duran until after this lawsuit was filed. (Doc. No.
 27 19-1 at 2-3.) Furthermore, TMH argues that Pacific acted as Ms. Duran's supervisor,
 28 and that TMH had no role in directing Ms. Duran's duties. (Doc. No. 19 at 3.)

1 Plaintiffs assert that Harvey Pollack, the Chief Financial Officer of Pacific, was
2 Ms. Duran's direct supervisor. (Doc. No. 17-1 at 2.) They argue that Ms. Duran was
3 therefore an agent of Pacific. (Doc. No. 17 at 25.) But Pacific asserts that Ms. Duran
4 was an employee of TMH and that Mr. Pollack only supervised some aspects of Ms.
5 Duran's work. (Doc. No. 18-2 at 3.)

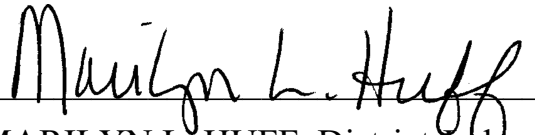
6 "Generally, for an agency relationship to exist, a principal must consent to the
7 agent acting on his behalf and subject to his control, and the agent must consent to act
8 for the principal." Holley, 400 F.3d at 673 (citing Restatement (Second) of Agency §
9 1). Both TMH and Pacific have raised genuine issues of material fact regarding
10 whether they had an agency relationship with Ms. Duran. As a result, the Court denies
11 Plaintiffs' motion for summary judgment.

12 **IV. Conclusion**

13 Because genuine issues of disputed fact exist at least with respect to vicarious
14 liability, summary judgment is not appropriate. Accordingly, the Court denies
15 Plaintiffs' motion.

16 **IT IS SO ORDERED.**

17 DATED: February 13, 2014

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19 MARILYN L. HUFF, District Judge
20 UNITED STATES DISTRICT COURT
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